



State of New Jersey
GOVERNMENT RECORDS COUNCIL

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CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

RICHARD E. CONSTABLE, III
Commissioner

FINAL DECISION

July 31, 2012 Government Records Council Meeting

Susan Kehoe
Complainant

Complaint No. 2010-300

v.

NJ Department of Environmental Protection,
Division of Fish & Wildlife
Custodian of Record

At the July 31, 2012 public meeting, the Government Records Council (“Council”) considered the June 19, 2012 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business day period of a date certain when access to the records would be granted or denied, the Custodian failed to sufficiently respond to the Complainant’s request pursuant to Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009), and the Complainant’s request item is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. Because OPRA does not require custodians to research files, correlate data, and compile a record that may be responsive to a complainant’s request, the Custodian had no legal duty to create a record containing the information which the Complainant specifically requested; therefore, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. and the Superior Court’s decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, (App. Div. 2005). *See also* Fang v. Department of Transportation, GRC Complaint No. 2006-93 (May 2007).
3. Because the Custodian certified in the Statement of Information dated April 12, 2011 that no records responsive to the Complainant’s requests exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business day period of a date certain when access to

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the records would be granted or denied and thereby failed to sufficiently respond to the Complainant's request, no records responsive to the Complainant's requests exist the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk's Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 31st Day of July, 2012

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Denise Parkinson Vetti, Secretary
Government Records Council

Decision Distribution Date: August 6, 2012

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
July 31, 2012 Council Meeting**

Susan Kehoe¹
Complainant

GRC Complaint No. 2010-300

v.

New Jersey Department of Environmental Protection, Division of Fish and Wildlife²
Custodian of Records

Records Relevant to Complaint:³

1. How many black bears were radio collared in the years 2003 and 2005?
2. How many radio collared black bears were killed during the bear hunts in the years 2003 and 2005?

Request Made: October 19, 2010

Response Made: October 27, 2010

Custodian: Matthew J. Coefer

GRC Complaint Filed: November 12, 2010⁴

Background

October 19, 2010

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

October 27, 2010

Custodian's response to the OPRA request. The Custodian responds in writing via e-mail to the Complainant's OPRA request on the sixth (6th) business day following receipt of such request. The Custodian states that records responsive to the request have been located and will be disclosed to the Complainant.

November 8, 2010

Telephone call from the Complainant to the Custodian. The Complainant informs the Custodian that she received the requested records but the records are not responsive to her request.

¹ No legal representation listed on record.

² Represented by DAG Dean Jablonski, on behalf of the NJ Attorney General; however, there are no submissions from the Custodian's Counsel to the GRC on file.

³ In the Denial of Access Complaint, the Complainant modified her request to ask for records that reveal the information she sought in her OPRA request.

⁴ The GRC received the Denial of Access Complaint on said date.

November 9, 2010

E-mail from the Custodian to the Complainant. The Custodian states that he is revising the response to the OPRA request and is denying the Complainant's request because the request requires the Custodian to conduct research and correlate data which is not required pursuant to N.J.S.A. 47:1A-9 and MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005).

November 12, 2010

Denial of Access Complaint filed with the Government Records Council ("GRC") with the following attachments:

- Complainant's OPRA request dated October 19, 2010
- Custodian's response to the OPRA request dated October 27, 2010
- E-mail from the Custodian to the Complainant dated November 9, 2010

The Complainant states that she filed her OPRA request for the records relevant to the complaint on October 19, 2010 and in reply the Custodian sent her records that were not responsive to her request. The Complainant further states that she subsequently spoke with Anne Hartnagle at the New Jersey Department of Environmental Protection ("NJDEP") and verbally modified her request to ask for records that reveal the information she sought in her OPRA request, and that Ms. Hartnagle told the Complainant that she would obtain the correct records for the Complainant from the Division of Fish and Wildlife ("Fish and Wildlife").

The Complainant states that on November 9, 2010, the Complainant received two (2) e-mails from the Custodian.⁵ The Complainant states that the first e-mail informed the Complainant that records responsive to her request have been identified and will be disclosed to the Complainant via fax, and the second e-mail informed the Complainant that her request had been denied because it would require the Custodian to conduct research and correlate data which is not required of the Custodian pursuant to OPRA and MAG, *supra*.

The Complainant states that on November 10, 2010 she spoke with Ms. Hartnagle who told the Complainant that Fish and Wildlife will require approximately eight (8) hours to retrieve the requested records and it will cost the Complainant between \$479.00 and \$548.00 not including copying fees.

The Complainant does not agree to mediate this complaint.

April 6, 2011

Request for the Statement of Information ("SOI") sent to the Custodian.

⁵ The evidence of record reveals that the two referenced e-mails were sent on different dates. The e-mail that informed the Complainant that records responsive to her request have been identified and will be disclosed to the Complainant was dated October 27, 2010 and the e-mail that informed the Complainant that her request had been denied was dated November 9, 2010.

April 12, 2011⁶

Custodian's SOI with the following attachments:

- Black Bear Season Legal Harvest Summary dated 2003
- Black Bear Season Summary dated 2005
- Complainant's OPRA request dated October 19, 2010
- Custodian's response to the OPRA request dated October 27, 2010
- E-mail from the Custodian to the Complainant dated November 9, 2010

The Custodian certifies that his search for the requested records involved assigning the Complainant's request to his assistant, Ms. Hartnagle, who reviewed the request and reassigned it to NJDEP's Natural and Historic Resources Program ("NHRP"). The Custodian further certifies that Ms. Debbie Zook at NHRP determined that the records responsive to the complaint were the 2003 Black Bear Season Legal Harvest Summary and the 2005 Black Bear Season Summary and that Ms. Zook notified the Custodian accordingly on October 26, 2010.

The Custodian certifies that on October 27, 2010 he responded in writing to the Complainant's OPRA request informing her that records responsive to her request were located and will be sent to the Complainant via facsimile transmission. The Custodian certifies that he subsequently realized that the Complainant did not have a fax number and therefore the Custodian certifies that he mailed the requested records to the Complainant on November 3, 2010. The Custodian further certifies that on November 8, 2010 the Complainant telephoned his office to inform the Custodian that the records that were disclosed to her were not responsive to her request.

The Custodian certifies that he investigated the Complainant's allegation and confirmed that the records disclosed to the Complainant were not responsive to her request. The Custodian certifies that he contacted Ms. Zook at NHRP and that Ms. Zook subsequently checked with Fish and Wildlife to determine if records responsive to the Complainant's request were available. The Custodian certifies that he has knowledge that Fish and Wildlife informed Ms. Zook that records responsive to the Complainant's request do not exist. The Custodian further certifies that in order to create a record responsive to the Complainant's request, the Custodian would not only have to review information about bears that were killed, but also extract information from active radio collars during the relevant time period. The Custodian certifies that such research, correlation of data, and record creation is not required pursuant to MAG, *supra*, and that he so informed the Complainant via an e-mail dated November 9, 2010. The Custodian also certifies that Ms. Hartnagle confirmed the Custodian's denial of access during a telephone conversation she had with the Complainant on November 10, 2010.

Analysis

⁶ The Custodian did not certify whether any records responsive to the Complainant's OPRA request were destroyed in accordance with the Records Destruction Schedule established and approved by Records Management Services as is required pursuant to Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007) because the Custodian certified that no records responsive to the Complainant's request exist. Susan Kehoe v. New Jersey Department of Environmental Protection, Division of Fish and Wildlife, 2010-300 – Findings and Recommendations of the Executive Director

Whether the Custodian sufficiently responded to the Complainant's OPRA request?

OPRA provides that:

“[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ...” N.J.S.A. 47:1A-5.g.

OPRA further provides that:

“[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but *not later than seven business days after receiving the request* ... In the event a custodian fails to respond within seven business days after receiving a request, *the failure to respond shall be deemed a denial of the request* ...” (Emphasis added.) N.J.S.A. 47:1A-5.i.

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, a custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g.⁷ Thus, a custodian's failure to respond in writing to a complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

The Custodian and the Complainant are in agreement that the Custodian received the Complainant's OPRA request on October 19, 2010. The parties are in disagreement with respect to the date of the Custodian's response to the OPRA request: the Custodian certified that he responded to the request in writing on October 27, 2010, whereas the Complainant contends that the Custodian did not respond until November 9, 2010.

The evidence of record reveals that the Custodian responded in writing to the Complainant's OPRA request on October 27, 2010, the sixth (6th) business day following receipt of the request, stating that records responsive to the request have been located and would be disclosed to the Complainant. The Custodian certified that he did not have a fax number for the Complainant so he mailed the requested records to the Complainant on

⁷ It is the GRC's position that a custodian's written response either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

November 3, 2010. The Custodian further certified that on November 8, 2010, the Complainant telephoned his office to inform the Custodian that the records that were disclosed to her were not responsive to her request. The Custodian subsequently sent the Complainant a revised response on November 9, 2010, after realizing that the records originally disclosed to the Complainant were not responsive to the Complainant's request, wherein he informed the Complainant that records responsive to the request do not exist.

Because the Custodian notified the Complainant on October 27, 2010, the sixth (6th) business day following receipt of the request, that he located the requested records and would disclose the records to the Complainant, the Custodian responded to the Complainant's OPRA request in a timely manner. However, by not informing the Complainant of a date certain when access to the records would be granted or denied, the Custodian failed to sufficiently respond to the Complainant's request.

In Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009), the Custodian responded on the sixth (6th) day after receipt of the Complainant's request stating that the New Jersey State Prison ("NJSP") OPRA liaison would notify the Complainant if any records responsive to the request exist. The GRC held that this response was in violation of OPRA:

"because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business days of when the NJSP OPRA liaison would respond to the Complainant's February 25, 2008, OPRA request, the Custodian's written response to the Complainant's request is inadequate under OPRA pursuant to Hardwick, *supra*, and the Complainant's February 25, 2008 OPRA request is "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and Kelley, *supra*."

Similarly here the Custodian's response to the OPRA request was inadequate. Specifically, the Custodian responded on the sixth (6th) day following receipt of the Complainant's request stating that that records responsive to the request have been located and would be disclosed to the Complainant; however, the Custodian failed to provide a date certain when access to the records would be granted or denied.

Therefore, because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business day period of a date certain when access to the records would be granted or denied, the Custodian failed to sufficiently respond to the Complainant's request pursuant to Ghana, *supra*, and the Complainant's request item is "deemed" denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley, *supra*.

Whether the Custodian unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

The Custodian certified in the SOI that Fish and Wildlife informed Ms. Zook that records responsive to the Complainant’s request do not exist. Moreover, the Custodian certified that in order to provide a record responsive to the Complainant’s request, he would have to review all of the information about bears that were killed in New Jersey and also extract information from active radio collared bears during the time period requested by the Complainant. The Custodian certified that such research, correlation of data, and record creation is not required of records custodians pursuant to MAG, supra. The Custodian, therefore, certified that he was under no obligation to create and disclose such a record.

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, 546 (App. Div. 2005).

The Council relied upon the court’s decision in MAG, supra, when deciding Fang v. Department of Transportation, GRC Complaint No. 2006-93 (May 2007). In Fang, the Complainant filed a request with the agency for disciplinary action records and specified particular information that the records had to contain. The Custodian certified that no

records existed which represented a compilation of the information requested. The Complainant filed a Denial of Access Complaint and the Council subsequently held that:

“[b]ecause OPRA does not require custodians to research files to discern which records may be responsive to a request or compile records which do not otherwise exist, the Custodian has met his burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. See MAG Entertainment v. Div. of ABC, 375 N.J.Super. 534 (App. Div. 2005).”

Similarly in the instant complaint, because OPRA does not require custodians to research files, correlate data, and compile a record that may be responsive to a complainant’s request, the Custodian had no legal duty to create a record containing the information which the Complainant specifically requested; therefore, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. and the Superior Court’s decision in MAG, *supra*. See also Fang, *supra*.

The Custodian further certified that no record exists which is responsive to the Complainant’s request and the Complainant provided no evidence to refute the Custodian’s certification.

In Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005), the complainant sought telephone billing records showing a call made to him from the New Jersey Department of Education. The custodian responded stating that there was no record of any telephone calls made to the complainant. The custodian subsequently certified that no records responsive to the complainant’s request existed and the complainant did not provide any evidence to refute the custodian’s certification. The GRC determined that although the custodian failed to respond to the OPRA request in a timely manner, the custodian did not unlawfully deny access to the requested records because the custodian certified that no records responsive to the request existed.

Therefore, because the Custodian certified in the SOI dated April 12, 2011 that no records responsive to the Complainant’s requests exist, and because there is no credible evidence in the record to refute the Custodian’s certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*.

Whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the circumstances?

OPRA states that:

“[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian’s actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian’s actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170, 185 (2001); the Custodian must have had some knowledge that his actions were wrongful (Fiedler v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian’s actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian’s actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian’s actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86, 107 (App. Div. 1996).

In the matter before the Council, although the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business day period of a date certain when access to the records would be granted or denied and thereby failed to sufficiently respond to the Complainant’s request, no records responsive to the Complainant’s requests exist and the evidence of record does not indicate that the Custodian’s violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business day period of a date certain when access to the records would be granted or denied, the Custodian failed to sufficiently respond to the Complainant’s request pursuant to Ghana v. New Jersey Department of Corrections, GRC Complaint No. 2008-154 (June 2009), and the Complainant’s request item is “deemed” denied pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

2. Because OPRA does not require custodians to research files, correlate data, and compile a record that may be responsive to a complainant's request, the Custodian had no legal duty to create a record containing the information which the Complainant specifically requested; therefore, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to N.J.S.A. 47:1A-6. and the Superior Court's decision in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534, (App. Div. 2005). *See also* Fang v. Department of Transportation, GRC Complaint No. 2006-93 (May 2007).
3. Because the Custodian certified in the Statement of Information dated April 12, 2011 that no records responsive to the Complainant's requests exist, and because there is no credible evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to said records pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
4. Although the Custodian failed to notify the Complainant in writing within the statutorily mandated seven (7) business day period of a date certain when access to the records would be granted or denied and thereby failed to sufficiently respond to the Complainant's request, no records responsive to the Complainant's requests exist the evidence of record does not indicate that the Custodian's violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances.

Prepared By: John E. Stewart, Esq.

Approved By: Karyn Gordon, Esq.
Acting Executive Director

June 19, 2012